Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554

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| In the Matter of | ) | |
| | ) | |
| REPORT TO CONGRESS | ) | Report No. SPB-206 |
| REGARDING THE ORBIT ACT | ) | |
| | ) | |

To: The Commission

**COMMENTS OF SES AMERICOM, INC.**

SES AMERICOM, Inc. ("SES AMERICOM"), by its attorneys and pursuant to a Public Notice issued by the Federal Communications Commission (the "FCC" or the "Commission"),[1] hereby submits these comments. The Commission has requested comments in the context of preparing its Report to Congress Regarding the ORBIT Act, to be submitted on June 15, 2004, pursuant to Section 646 of the Open-market Reorganization for the Betterment of International Telecommunications Act (the "ORBIT Act").[2]

As the Commission prepares to submit its annual Report to Congress Regarding the ORBIT Act, the Commission stands at a critical juncture in its charge to implement and enforce the terms of this vital piece of legislation. Over the past few months, the Commission has been asked to review transactions involving both Intelsat and Inmarsat that raise significant questions of ORBIT Act compliance. As to Intelsat, the Commission has been asked by SES AMERICOM to review an order of the

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1 Public Notice, Report No. SPB-206, IB Docket No. 04-158 (Apr. 23, 2004).

2 ORBIT Act, Pub. L. No. 106-180, 115 Stat. 48 (2000), as amended, Pub. L. No. 107-223, 116 Stat. 1480, § 646 (2002).

International Bureau granting special temporary authority to Intelsat to offer certain "additional services" that the ORBIT Act otherwise prohibits Intelsat from offering prior to its initial public equity offering ("IPO"). The Commission has also been asked to review certain issues relating to the anticompetitive threat posed by Intelsat's entry into the U.S. domestic satellite market. With respect to Inmarsat, the Commission is currently considering whether Inmarsat has satisfied the ORBIT Act's IPO requirements by effectuating a private equity transfer, and a public debt offering to certain institutional investors, in lieu of an equity IPO.

The manner in which the Commission resolves these issues, and its timeliness in doing so, will test the commitment of the Commission faithfully to execute and enforce both the language of the ORBIT Act and the underlying intent of Congress in enacting that law. The Commission has a unique opportunity to act on both the Intelsat and Inmarsat matters prior to June 15, 2004, and then to report to Congress that the Commission's actions demonstrate concretely its commitment to enforcing the ORBIT Act.

## I. THE COMMISSION SHOULD RULE ON THE ORBIT ACT IMPLICATIONS OF INTELSAT'S RECENT ACQUISITION OF LORAL'S SATELLITES.

Issues relating to Intelsat's recent acquisition of certain of Loral's domestic satellites and space station licenses present an opportunity for the Commission to affirm its obligation to enforce the text and spirit of the ORBIT Act. On July 28, 2003, Loral and Intelsat filed with the Commission an Application for Consent to Assignments

to effectuate their transaction.[3] SES AMERICOM filed comments urging the Commission, in accordance with its responsibilities under the ORBIT Act, to impose conditions on its approval of the Application in order to protect competition in the U.S. satellite market.[4] The International Bureau (the "Bureau") issued an Order and Authorization granting the Application without imposing the requested conditions.[5] The Bureau also granted *sua sponte* -- and without soliciting public comment -- special temporary authority ("STA") to Intelsat to provide direct-to-home ("DTH") satellite capacity for a period of 180 days to former customers of Loral.[6]

SES AMERICOM challenged the lawfulness of this grant of STA in an Application for Review that it filed with the Commission on March 12, 2004.[7] In the

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3 *See* Loral Satellite, Inc., Loral SpaceCom Corporation, and Intelsat North America LLC, Applications for Consent to Assignments, File Nos. SAT-ASG-20030728-00138, SAT-ASG-20030728-00139.

4 SES AMERICOM, Inc., Comments of SES AMERICOM, Inc., File Nos. SAT-ASG-20030728-00138, SAT-ASG-20030728-00139 (filed Sept. 15, 2003), at 18-19, 23 ("Application Comments").

5 *Loral Satellite, Inc. (Debtor-in-Possession) and Loral SpaceCom Corporation (Debtor-in-Possession), and Intelsat North America LLC, Applications for Consent to Assignment of Space Station Authorizations and Petition for Declaratory Ruling under Section 310(b)(4) of the Communications Act of 1934*, Order and Authorization, DA 04-357, File Nos. SAT-ASG-20030728-00138, SAT-ASG-20030728-00139 (Feb. 11, 2004), as amended, Supplemental Order, DA-04-612 (Mar. 4, 2004) (the "Loral-Intelsat Order").

6 *Id.*

7 SES AMERICOM, Inc., Application for Review, File Nos. SAT-ASG-20030728-00138, SAT-ASG-20030728-00139, at 20-24 (the "Application for Review") (attached hereto as Appendix A).

same Application for Review, SES AMERICOM also challenged the Bureau's refusal to impose the conditions requested by SES AMERICOM.[8]

A. *The Commission Should Examine Promptly the Lawfulness of the Bureau's Grant of STA to Intelsat.*

As SES AMERICOM noted in its Application for Review, the Communications Act of 1934 authorizes the Commission to grant STA only where doing so is "otherwise authorized by law."[9] As the Bureau itself correctly acknowledged in its Order, Section 602(a) of the ORBIT Act expressly and unequivocally prohibits Intelsat from offering DTH capacity, as well as any other "additional service," prior to its conducting an IPO.[10] Indeed, Section 602(a) directs the Commission to "take all necessary measures," including denial of licensing for "additional services," to implement the requirement that Intelsat "shall not be permitted to provide additional services" prior to completing its IPO.[11] Furthermore, no other provision of the ORBIT Act contains language that reasonably can be interpreted to grant the Commission any measure of discretion to bypass Section 602(a).[12] Because the ORBIT Act prohibits Intelsat from offering, and prohibits the Commission from allowing Intelsat to offer, pre-IPO "additional services," the Bureau clearly exceeded its statutory authority in granting STA to Intelsat.

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8 *Id.* at 12-20.

9 *See id.* at 20-21 (*quoting* 47 U.S.C. § 309(f)).

10 Loral-Intelsat Order at ¶¶ 58-59, 64.

11 ORBIT Act, § 602(a).

12 *See* Application for Review at 22-23.

The effect of the Bureau's erroneous decision to grant STA has been to reward Intelsat for its repeated delays in completing its privatization. Indeed, the Bureau's grant of STA offers to Intelsat precisely what Congress intended to hold in reserve until Intelsat conducts an IPO: "the ability to expand [its] market presence and solidify a broader customer base."[13] The Bureau, moreover, has rewarded Intelsat for its failures at the expense of Intelsat's competitors, who -- far from experiencing any of the intended benefits of Intelsat's ORBIT Act privatization -- are in fact being deprived of their rightful opportunity to compete for and absorb the DTH business of Loral's former customers. This reward comes in spite of the fact that Intelsat's existing access to U.S. markets has generated no new jobs within the United States, and no greater industry access to the global marketplace. As noted in the FCC's Public Notice, these are among the most important goals that the ORBIT Act sought to achieve by requiring complete privatization;[14] to date, they have not been achieved.

In a Motion filed on March 12, 2004, SES AMERICOM urged the Commission to expedite its review of the Bureau's grant of STA, such that the Commission could resolve the issue before the parties could consummate their proposed satellite sale, and before the Bureau's error could translate into a serious violation of the ORBIT Act.[15] The parties have long since concluded their transaction, and Intelsat has already begun to provide DTH capacity to Loral's former customers. Still, the

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[13] *See id.* at 23 (*quoting* Senate Committee on Commerce, Science, and Transportation, Sen. Rep. No. 106-100, at 2 (Jun. 30, 1999)).

[14] *See* Public Notice, *supra* note 1.

[15] SES AMERICOM, Inc., Motion for Expedited Consideration in Part of Application for Review, File Nos. SAT-ASG-20030728-00138, SAT-ASG-20030728-00139 (attached hereto as Appendix B).

Commission has failed to act upon either SES AMERICOM's Application for Review or its Motion for Expedited Consideration. An expeditious ruling by the Commission remains essential to redress the Bureau's error and to restore the integrity of the ORBIT Act.[16]

Now that Congress has passed a bill that would grant Intelsat yet another extension of its IPO deadline,[17] prompt Commission action to vacate the STA is more important than ever. Putting aside the question of the lawfulness of the STA, the Bureau intended for its grant of STA to serve as but a temporary means for Intelsat's DTH customers to transition to other satellite vendors. The Commission must act to ensure that this STA does not, like the IPO deadline, become subject to ongoing extensions.[18] The Commission should not permit STA to be converted into a permanent vehicle for Intelsat to offer "additional services" for the year or longer in which Intelsat will likely be able to delay its IPO.

### *B. The Commission Should Reconsider the Bureau's Refusal to Impose Conditions on the Assignment of Loral's Space Station Licenses to Intelsat.*

As part of its Application for Review, SES AMERICOM also asked the Commission to reconsider the Bureau's refusal to impose certain conditions, relating to

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[16] *Id.* at 2-3.

[17] Bill to Amend the Communications Satellite Act of 1962 to Extend the Deadline for the INTELSAT Initial Public Offering, S. 2315, 108th Cong. (2004) (passed by both the U.S. Senate and House of Representatives) (would extend Intelsat's IPO deadline until June 30, 2005, with the possibility of a further extension until December 31, 2005).

[18] Indeed, an Intelsat spokeswoman has already said that "Intelsat would consider asking the FCC to extend its [STA]" after Congressional extension of the IPO deadline. COMMUNICATIONS DAILY, April 30, 2004, at 11.

U.S. Government marketing by Intelsat, upon the assignment to Intelsat of Loral's domestic space station licenses.[19] SES AMERICOM demonstrated that the ORBIT Act requires the imposition of such conditions in order to curtail the harm to competition that Intelsat's unfettered entry into the U.S. Government domestic satellite services market presents.[20] In particular, SES AMERICOM warned that Intelsat will be able to use its existing leverage as the dominant provider of satellite service on the international component of certain U.S. Government contracts in order to eliminate competition for the domestic portion of those contracts.[21]

The Commission should grant promptly SES AMERICOM's Application for Review and thereby ensure that Intelsat does not access the U.S. markets in a manner that will harm competition, as the Commission is required to do under the ORBIT Act. Such a grant, and the concomitant imposition on Intelsat of nonburdensome U.S. Government marketing conditions, would also help to achieve one of the key goals of the ORBIT Act, as set forth in the Commission's recent Public Notice: to promote better satellite "industry access to the global marketplace."[22]

## II. THE COMMISSION SHOULD RULE ON WHETHER INMARSAT HAS COMPLIED WITH THE IPO REQUIREMENTS OF SECTION 621 OF THE ORBIT ACT.

The Commission is also faced with the critical question of whether Inmarsat has complied with Section 621 of the ORBIT Act. That Section requires

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[19] *See* Application for Review at 12-20.

[20] *See id*; *see also* Application Comments at 18-19.

[21] *See* Application for Review at 12-20.

[22] Public Notice, *supra* note 1.

Inmarsat to conduct an initial public offering that substantially dilutes the ownership interests of Inmarsat's former Signatories and transforms Inmarsat into an independent commercial entity.[23] In a February 10, 2004, letter to the Commission, Inmarsat claimed to have complied with Section 621 by privately transferring a portion of its equity interests to new, private holders, and by financing this transfer through a public offering of debt securities.[24] SES AMERICOM has filed comments urging the Commission to reject Inmarsat's declaration of compliance.[25]

As SES AMERICOM demonstrated in its comments, Inmarsat's hybrid transactions are contrary to the plain language and the legislative history of Section 621, which unambiguously require Inmarsat to conduct an IPO of equity securities as the sole acceptable means of achieving dilution and commercial independence.[26]

Also in its comments, SES AMERICOM urged the Commission to reject Inmarsat's claim that its transactions need not conform to the statutory text, but instead need only be "consistent with" certain goals of the ORBIT Act to be compliant with Section 621.[27] The Commission has never before, nor should it now, interpret the "consistent with" standard of review to sanction the abrogation of an entire provision of

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[23] ORBIT Act, § 621.

[24] *See* Letter from Alan Auckenthaler, Inmarsat, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission. It appears that Inmarsat's focus in the public debt offering is on "institutional investors." *Id.* at 10.

[25] See SES AMERICOM, Inc., Comments of SES AMERICOM, Inc., File No. SAT-MSC-20040210-00027 (filed Apr. 5, 2004) (the "SES AMERICOM-Inmarsat Comments") (attached hereto as Appendix C).

[26] *Id.* at 10-13.

[27] *Id.* at 13-15.

the ORBIT Act.[28] At most, that standard of review has been interpreted to grant the Commission a "degree of flexibility" in evaluating Inmarsat's progress toward fulfilling its statutory obligations.[29] Inmarsat is undeserving of even a small bit of flexibility in this instance because the ORBIT Act already authorizes the Commission to extend the IPO deadline to accommodate the very concerns about poor market conditions that Inmarsat says prompted it to abandon its efforts at conducting an equity IPO.[30]

To the extent that the Commission judges Inmarsat's transactions by their consistency with the goals of the ORBIT Act, the Commission must also consider whether the transactions achieve these goals in a manner "consistent with" an equity IPO.[31] Inmarsat's transactions fail this test because they do not broaden corporate ownership and control, and do not transform Inmarsat into a publicly held and traded corporation, as would typically occur under an equity IPO.[32] These transactions furthermore fail to subject Inmarsat to a level of securities regulation that is comparable to what Inmarsat would experience if it conducted an equity IPO.[33]

A firm rejection of Inmarsat's actions is necessary, not only to ensure that Inmarsat fully complies with the text of Section 621, but also to ensure that Inmarsat and

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[28] *Reply of SES AMERICOM, Inc.*, File No. SAT-MSC-20040210-00027 (filed Apr. 30, 2004), at 14-15 (the "Reply").

[29] *See id.* at 14.

[30] *See* SES-AMERICOM-Inmarsat Comments at 13-15.

[31] *See* Reply at 15-16.

[32] *See* SES-AMERICOM-Inmarsat Comments at 15-17.

[33] *See id.* at 18-20; Reply at 19-21.

others are not emboldened in the future to pursue similar means of evading their obligations under the ORBIT Act.[34]

## III. CONCLUSION

The aforementioned proceedings present the Commission with important opportunities to clarify areas of the ORBIT Act that are presently the subject of debate. The Commission should pursue a prompt resolution of these proceedings in a manner that will reaffirm its commitment to ensure that the words and the will of Congress, as expressed in the ORBIT Act, are fully and faithfully executed.

Respectfully submitted,

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May 7, 2004

[34] In its latest Amendment to Form F-1, filed with the Securities and Exchange Commission, Intelsat has indicated that it is already engaged in discussions with potential private investors about a possible acquisition of the company, as perhaps an alternative to an equity IPO. *See* Intelsat, Ltd, Amendment No.1 to Form F-1 (filed Apr. 22, 2004).

# APPENDIX A

Before the
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| In the Matter of | ) | |
| | ) | |
| Loral Satellite, Inc. | ) | |
| (Debtor-in-Possession) and | ) | |
| Loral SpaceCom Corporation | ) | |
| (Debtor-in-Possession), | ) | |
| Assignors, | ) | File Nos. SAT-ASG-20030728-00138 |
| | ) | SAT-ASG-20030728-00139 |
| and | ) | |
| | ) | |
| Intelsat North America LLC, | ) | |
| Assignee, | ) | |
| | ) | |
| Applications for Consent to Assignments | ) | |
| of Space Station Authorizations | ) | |

To: The Commission

## APPLICATION FOR REVIEW


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March 12, 2004

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## SUMMARY

SES AMERICOM hereby requests that the Commission review an Order and Authorization issued by the International Bureau on February 11, 2004, granting authorization for the assignment to Intelsat of FCC authorizations for six U.S. domestic satellites currently operated by Loral.

In prior comments, SES AMERICOM warned that this transaction would harm competition in the market for domestic satellite services provided to the U.S. Government. Specifically, SES AMERICOM explained that Intelsat's unfettered entry into the domestic satellite market would enable it to leverage its dominant position in various international markets to eliminate competition with respect to certain U.S. Government contracts. Presently, to meet U.S. Government requirements in areas where entities other than Intelsat cannot provide the required service, U.S. providers purchase capacity from Intelsat on a competitive basis for resale to the U.S. Government as part of a bundled package. Following the transaction, Intelsat will possess the incentive and ability to foreclose competition by the remaining domestic providers, by itself providing such bundled service to the U.S. Government in an anticompetitive manner.

SES AMERICOM requested that the Bureau, as a condition to approving the transaction, prohibit Intelsat from bidding to provide bundled service unless it can demonstrate that it: (i) sought bids, on a non-discriminatory basis, for subcontracting the domestic portion of its offering from all domestic providers in addition to its U.S. subsidiary; and/or (ii) offered to subcontract to each of the other domestic satellite providers for the international portion of such providers' bundled offering, on the same terms and conditions as applied to its U.S. subsidiary.

In its Order, the Bureau dismissed SES AMERICOM's concerns and conditions almost out of hand, applying an erroneous analysis that warrants review by the full Commission. The cryptic nature of the Bureau's response leaves the reader to guess the underlying nature of

the Bureau's reasoning. It relies solely on the fact that the domestic satellite market is competitive, but offers no explanation as to why this condition would make anticompetitive foreclosure impossible. The Bureau's analysis conflicts with more than a decade of decisions by the Federal antitrust enforcement authorities and the Commission itself. To the extent that the Bureau relies on the "single monopoly profit argument," it is now widely recognized that its application requires very specific conditions that are rarely present and are not present here.

In addition, the Bureau incorrectly concluded that the U.S. Government can design procurement procedures to protect itself from any anticompetitive effects of the acquisition. But without the protection of the proposed safeguards, Intelsat's anticompetitive behavior would be difficult or impossible to detect and guard against. Moreover, the Commission has an independent statutory obligation to protect competition by applying appropriate conditions. The Commission must thus reverse the Bureau's refusal to apply conditions.

Finally, the Bureau exceeded its statutory and delegated authority in granting a Special Temporary Authorization ("STA") to Intelsat to provide DTH service to former Loral customers for six months. The ORBIT Act expressly prohibits the Commission from authorizing Intelsat to provide such services prior to completion of its IPO, and provides no basis for the Commission to circumvent this rule via an STA. Under the ORBIT Act, the parties must either delay the closing of the acquisition of Loral's assets until after the Intelsat IPO, or divest the prohibited customers and services before consummation of the acquisition. The Commission must therefore vacate the STA, and must do so on an expedited basis to avoid any violation of the ORBIT Act, and to act before the issue becomes mooted by the passage of time.

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| Loral Satellite, Inc. | ) | |
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| Assignors, | ) | File Nos. SAT-ASG-20030728-00138 |
| | ) | SAT-ASG-20030728-00139 |
| and | ) | |
| | ) | |
| Intelsat North America LLC, | ) | |
| Assignee, | ) | |
| | ) | |
| Applications for Consent to Assignments of Space Station Authorization | ) | |

To: The Commission

## APPLICATION FOR REVIEW

SES AMERICOM, Inc. ("SES AMERICOM"), by its attorneys and pursuant to Section 1.115 of the Rules of the Federal Communication Commission (the "FCC" or the "Commission"),[1] hereby requests Commission review of an Order and Authorization issued by the International Bureau (the "Bureau") on February 11, 2004 (the "Order").[2] The Order, subject to certain conditions, grants applications filed by Loral Satellite Inc., Loral SpaceCom Corporation (together, "Loral"), and Intelsat North America, LLC ("Intelsat"), for authority to assign to Intelsat certain domestic space station licenses held by Loral.

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[1] 47 C.F.R. § 1.115.

[2] *Loral Satellite, Inc. (Debtor-in-Possession) and Loral SpaceCom Corporation (Debtor-in-Possession), and Intelsat North America, LLC, Applications for Consent to Assignment of Space Station Authorizations and Petition for Declaratory Ruling under Section 310(b)(4) of the Communications Act of 1934, as Amended*, DA 04-357, File Nos. SAT-ASG-20030728-00138, SAT-ASG-20030728-00139, Order and Authorization (Feb.11, 2004).

In comments before the Bureau, SES AMERICOM requested that the Bureau impose appropriate conditions on the proposed acquisition, in order to limit Intelsat's ability to leverage its dominant position in many foreign markets to harm competition in the market for domestic satellite services provided to the U.S. Government. In issuing the Order, however, the Bureau employed an erroneous, unsupported analysis of the potential impact of the acquisition on competition, and refused to apply the proposed conditions. In addition, although the Bureau concluded that the ORBIT Act prohibits Intelsat from providing certain "additional services" until it completes its initial public offering, the Bureau nonetheless ignored this statutory prohibition and permitted Intelsat to provide such services on a temporary basis.[3]

The Order is based on erroneous findings of fact and conclusions of law, involves questions of law and policy that have not previously been resolved by the Commission, and involves the exercise of delegated authority in a manner in conflict with statute.[4] The Commission should therefore modify the Order to adopt the conditions proposed by SES AMERICOM. The Commission should also revoke, on an expedited basis, the temporary authorization granted to Intelsat to provide additional services.

## I. INTRODUCTION AND BACKGROUND

### *A. SES AMERICOM*

SES AMERICOM and its subsidiaries provide U.S. and international satellite services through a fleet of 18 geosynchronous satellites. SES AMERICOM is one of the largest U.S. providers of fixed satellite service ("FSS") transponder capacity. Through its Americom Government Services, Inc., subsidiary, the company also provides satellite services to the U.S.

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[3] In its Comments, SES AMERICOM also made arguments regarding the impact of the ORBIT Act on the transaction. *See* Comments at 18-20.

[4] *See* 47 C.F.R. §§ 1.115(b)(2)(i), (ii), (iv).

Government, including the Departments of Homeland Security ("DHS") and Defense ("DOD") and the Federal Bureau of Investigation ("FBI"). SES AMERICOM's parent company, SES GLOBAL S.A., is the premier global FSS operator.

*B.* *The Applicants*

1. Intelsat

Intelsat is a successor entity to the International Telecommunications Satellite Organization, which was formed by treaty in 1971 as an intergovernmental consortium[5] charged with developing and operating a global telecommunications satellite system to service member states.[6] For the first 17 years of its existence, Intelsat enjoyed a monopoly in the provision of global telecommunications services. Even after competition emerged in the international satellite markets in the mid-1980s, Intelsat largely maintained its dominant position due to the efforts of Intelsat's Signatories to resist competition.[7]

In 2000, the U.S. Congress passed the Open-market Reorganization for the Betterment of International Telecommunications Act (the "ORBIT Act"),[8] primarily out of concern for Intelsat's ability to exploit unfairly both its status as an IGO and its special

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[5] As an Intergovernmental Organization ("IGO"), Intelsat was granted by the United States, its the host country, "the privileges, exemptions, and immunities conferred by the International Organizations Immunities Act." Exec. Order 11966, 42 Fed. Reg. 4331 (1977).

[6] *See generally Comsat Study—Implementation of Section 505 of the International Maritime Satellite Telecommunications Act*, Final Report and Order, 77 F.C.C.2d 564 (1980).

[7] Intelsat's Signatories, which included government-owned entities and even regulators, were named by the member nations to operate the Intelsat assets in each country (*e.g.*, COMSAT in the United States). These Signatories were also the entities that had ownership interests in the IGO.

[8] ORBIT Act, Pub. L. No. 106-180, 114 Stat. 48 (2000), as amended, Pub. L. No. 107-233 § 1, 116 Stat. 1480, codified at 47 U.S.C. § 646 *et seq.* (2002) (the "ORBIT Act").

relationships with member governments. The ORBIT Act established a framework and timetable for the pro-competitive privatization of Intelsat, including an October 1, 2001, deadline for the completion of an initial public offering ("IPO"), and the prohibition of practices involving exclusive market access in its member nations.[9]

Intelsat became a private company in July 2001 by distributing its shares to the same entities that had been its Signatories.[10] Since then, at Intelsat's request, both Congress and the Commission have extended the company's IPO deadline, with the last such extension running through June 30, 2004.[11] Intelsat is currently owned by over 220 entities representing more than 145 nations.[12] Many of its owners are state-owned or controlled postal, telephone and telegraph agencies, some of which maintain strict monopolies over the provision of telecommunications services in their respective countries. Intelsat operates a global satellite fleet providing international communications connectivity.[13] Intelsat currently provides virtually no U.S. domestic service.

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[9] 47 U.S.C. §§ 763, 765(g).

[10] *See Intelsat LLC Request for Extension of Time Under Section 621(5) of the ORBIT Act*, 16 FCC Rcd 18185, ¶ 9 (2001); *see also* Intelsat Form 20-F (2003).

[11] *Intelsat LLC Request for Extension of Time Under Section 621(5) of the ORBIT Act, File No.* SAT-MSC-20030822-00292 (Dec. 17, 2003).

[12] *See Loral Satellite, Inc. (Debtor-in-Possession) and Loral SpaceCom Corporation (Debtor-in-Possession), and Intelsat North America, LLC, Applications for Consent to Assignment of Space Station Authorizations and Petition for Declaratory Ruling under Section 310(b)(4) of the Communications Act of 1934, as Amended*, DA 04-357, File Nos. SAT-ASG-20030728-00138, SAT-ASG-20030728-00139 (July 28, 2003) (the "Applications") at 16 n.33.

[13] *See* Intelsat Form 20-F (2003).

2. Loral

In competition with SES AMERICOM, Loral provides satellite communications services in the United States, and also operates satellites for the provision of international services. Loral has sought Chapter 11 protection in the United States Bankruptcy Court in the Southern District of New York. After the sale of satellites to Intelsat, Loral has stated that it intends to emerge from bankruptcy protection and utilize its remaining satellite assets for the provision of international satellite service only.

C. *Procedural and Factual Background*

1. The Applications

On July 28, 2003, Loral and Intelsat filed the Applications with the Commission requesting authority for Loral to assign to Intelsat all FCC authorizations and pending applications relating to six satellites and related assets currently owned and operated by Loral.[14] These satellites are used almost exclusively for the provision by Loral of domestic satellite services in the United States, and would thus provide Intelsat with full access to the U.S. domestic satellite services market. The Bureau issued a Public Notice on August 15, 2003, affording interested parties an opportunity to comment on the Applications.[15] SES AMERICOM was among those parties that filed comments.[16]

2. Comments of SES AMERICOM

SES AMERICOM's Comments focused on the potential anticompetitive impact of the proposed transaction on the market for satellite services procured by the U.S.

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[14] *See* Applications at 1.

[15] Public Notice (filed Aug. 15, 2003).

[16] Comments of SES Americom, Inc. (filed Sep. 15, 2003) ("Comments").

Government.[17] Specifically, SES AMERICOM explained that Intelsat, largely as a product of its legacy as an IGO with privileged ties to member states, has remained the dominant, if not the exclusive, provider of satellite capacity between the United States and many international markets, including those markets that have emerged as objects of intense U.S. Government (and in particular, DOD, FBI and DHS) interest.[18] Intelsat, for example, has pre-existing regulatory access to many markets in the Middle East, Africa, and Central and South Asia, whereas competitors like SES AMERICOM and PanAmSat are often forced to engage in protracted, if not futile battles for similar access.[19] Often, the same regulatory authorities with which competitors must negotiate business are themselves shareholders in Intelsat with vested interests in foreclosing competition.[20]

As SES AMERICOM explained in its Comments, Intelsat's international dominance has not to date threatened the domestic component of the U.S. Government market for satellite services because Intelsat does not currently provide domestic satellite capacity to the U.S. government, or to U.S. customers generally.[21] Instead, the domestic component of the U.S. Government market has been provided by companies such as SES AMERICOM, PanAmSat, and Loral.[22] To the extent that the U.S. Government has sought combined domestic and international

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[17] *Id.* at 15-18.

[18] *Id.* at 8.

[19] *Id.* at 9-11, citing prior comments filed with the Commission by PanAmSat, in which PanAmSat detailed its difficulty procuring access to markets in which national satellite operators maintain favorable, and at times exclusive, relationships with Intelsat.

[20] *Id.* at 11.

[21] *Id.* at 13-14.

[22] *Id.* at 13.

service, with an international component involving one of the many markets in which Intelsat is the only feasible provider, domestic providers typically arrange to purchase international capacity from Intelsat, then offer to resell such capacity to the U.S. government as part of a packaged bid.[23]

SES AMERICOM warned in its Comments that the fragile competitive balance that exists from this system would be threatened by the unfettered entry of Intelsat into the U.S. domestic market.[24] Simply put, Intelsat would be able, and would have every incentive, to leverage its dominance in overseas markets to foreclose competition for the domestic portion of U.S. Government contracts.[25] SES AMERICOM highlighted the potential for Intelsat either to deny outright a competitor's request to subcontract international capacity, or to subcontract such capacity at higher prices than it would otherwise charge as part of its own bundled bid.[26] In either case, Intelsat could easily foreclose competition for a large number of contracts, to the disadvantage of both competitors and the U.S. Government.[27]

To safeguard against potential anti-competitive behavior without denying the entry of Intelsat as a new competitor into the domestic market, SES AMERICOM urged the Commission to attach conditions to any approval of the Applications.[28] Specifically, SES AMERICOM urged the Commission to prohibit Intelsat from bidding for the provision of

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[23] *Id.* at 14.

[24] *Id.* at 16.

[25] *Id.*

[26] *Id.* at 17-18.

[27] *Id.*

[28] *Id.* at 18-25.

bundled services to the U.S. Government using satellites subject to the Application, unless Intelsat can demonstrate that it:

1) sought bids for subcontracting the domestic portion of its bundled offering from all other domestic satellite providers in addition to its U.S. subsidiary, and in such bidding process treated its U.S. unit on an arm's length, non-discriminatory basis; and/or

2) offered to serve as a subcontractor to each of the other domestic satellite providers for the international portion of such providers' bundled offering, at the same prices and on the same terms and conditions as are applied to its U.S. subsidiary.[29]

As SES AMERICOM explained, these conditions would help ensure that Intelsat would not use its market dominance outside of the United States to the detriment of U.S. Government customers and the public interest.[30]

3. Opposition of Intelsat

In opposing SES AMERICOM's Comments, Intelsat devoted much of its attention to disputing SES AMERICOM's characterization of Intelsat's dominance in foreign markets.[31] Intelsat further argued that SES AMERICOM's proposed conditions are unnecessary due to existing mechanisms that, according to Intelsat, adequately safeguard against anticompetitive conduct.[32] Even if such safeguards are insufficient, Intelsat claimed, the U.S.

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[29] *Id.* at 23-24.

[30] *Id.* at 24.

[31] Opposition of Intelsat North America, LLC (filed Sep. 30, 2003) ("Opposition") at 5-8.

[32] Mechanisms cited include Intelsat's Distribution Agreement and its Wholesale Customer Agreement, which Intelsat characterized as permitting all similarly situated competitors to procure satellite capacity for their own use or as a component of a bundled service on a nondiscriminatory basis. Intelsat also cited its commitment not to increase rates on non-competitive routes, it's being subject to the Commission's dominant carrier safeguards on certain non-competitive routes, and the ORBIT Act's prohibition on exclusive arrangements. *Id.* at 8-9.

Government could itself remedy any problems by adjusting its own procurement procedures or by choosing to procure international access from non-U.S. providers other than Intelsat.[33] Intelsat also disputed SES AMERICOM's contention that Intelsat is poised to reap anticompetitive benefits from the acquisition.[34] According to Intelsat, if it "could somehow exact monopoly profits from its international market access and carry over those profits to its U.S. domestic business . . . it would have already done so," having already been authorized by the Commission to offer domestic service.[35]

4. Reply of SES AMERICOM

In its Reply Comments, SES AMERICOM noted Intelsat's general failure in its Opposition to address or alleviate the concerns raised by SES AMERICOM.[36] As SES AMERICOM explained, Intelsat failed to demonstrate how the regulatory mechanisms it cited would adequately safeguard competition for domestic satellite services provided to the U.S. Government. In addition, SES AMERICOM rebutted Intelsat's assertion that if it desired to exact monopoly profits by leveraging its international dominance, it would have done so already.[37] SES AMERICOM noted that, although Intelsat could indeed already offer bundled bids by purchasing domestic capacity and reselling it along with its international service,

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[33] *Id.* at 11-12.

[34] *Id.* at 14.

[35] *Id.*

[36] Reply of SES AMERICOM, Inc. (filed Oct. 10, 2003) ("Reply Comments") at 2.

[37] *Id.* at 16.

Intelsat's doing so would not afford it the same anticompetitive benefits as would the transaction, because in the former scenario, all of Intelsat's rates would necessarily be transparent.[38]

5. Order and Authorization, and Supplemental Order

On February 11, 2004, the Bureau issued the Order granting the Applications, subject to certain conditions and limitations not including the conditions proposed by SES AMERICOM. In considering SES AMERICOM's showing that the proposed assignment would harm competition in the market for domestic satellite services provided to the U.S. Government,[39] the Bureau framed its analysis in terms of the antitrust theory of "vertical foreclosure," concluding as follows:

> [W]e find no evidence in the record that participants in the provision of domestic services possess market power and could earn more than competitive profits. Because the firms are not earning more than a competitive return on domestic services, we do not find that the proposed transaction will provide an opportunity for a vertical foreclosure strategy. A vertical foreclosure strategy might be profitable (and therefore provide incentive to a supplier to engage in such strategy) if a supplier can limit access to or raise the price of its input in order to extract a larger share of the profits in the other market. If, as is the case here, firms providing domestic services are not earning more than a competitive return, no vertical foreclosure opportunity would become available with the proposed transaction. To the extent that Intelsat might have preferential access to some markets, the proposed transaction does not provide Intelsat with the ability to extract additional profits. It follows that there is no evidence that a foreclosure strategy would be profitable and thus would allow the merged firm to increase its profits.[40]

The Bureau also agreed with Intelsat that existing treaties, laws and regulations would deter anticompetitive conduct.[41] Furthermore, the Bureau concluded, U.S. Government

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[38] *Id.* at 16-17.

[39] *Order* at ¶ 30.

[40] *Id.* (footnote references omitted).

[41] *Id.* at ¶ 31.

agencies can design procurement procedures to address the problems that SES AMERICOM cited.[42] The Bureau thus determined that the proposed assignment does not raise significant anticompetitive issues, does not offend the public interest, and ultimately, does not warrant the imposition of the conditions put forth by SES AMERICOM.[43]

The Bureau also examined the impact of the ORBIT Act on the proposed assignment.[44] The Bureau specifically considered whether, and to what extent, the transaction would be restricted by Section 602(a) of the ORBIT Act, which provides that Intelsat and its successor entities "shall not," until privatized in accordance with the ORBIT Act, "be permitted to provide additional services," meaning "direct-to-home ('DTH') or direct broadcast satellite video services, or services in the Ka or V bands."[45] The Bureau flatly rejected Intelsat's assertion that it is no longer subject to the strictures of Section 602,[46] concluding instead that its "grant of authority to Intelsat North America prohibits Intelsat North America from providing additional services until successful completion of the IPO process as required by the ORBIT Act."[47]

Nevertheless, the Bureau claimed that "requiring Intelsat North America to cease to provide additional services . . . immediately upon approval of the Assignment application

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[42] *Id.*

[43] *Id.* at ¶¶ 30-31.

[44] *See id.* at ¶¶ 49-68.

[45] ORBIT Act, §§ 602, 681(a)(12(B).

[46] *Order* at ¶ 60 (citing *Applications of Intelsat LLC for Authority to Operate, and to Further Construct, Launch and Operate C-band and Ku-band Satellites that Form a Global Communications System in Geostationary Orbit*, Memorandum Opinion and Order and Authorization, 16 FCC Rcd 12280 (2001) ("*Intelsat LLC ORBIT Act Compliance Order*")).

[47] *Id.* at ¶ 63.

would result in disruption and/or discontinuance of service to existing Loral customers who provide such services e[sic] to end-users."[48] Although it acknowledged that the applicants could avoid such disruptions by delaying the transaction until after Intelsat conducts its IPO, the Bureau expressed concern that such a delay could result in the demise of the transaction.[49] Instead, the Bureau granted Intelsat a Special Temporary Authorization ("STA") to "continue to provide the DTH services currently provided by Loral for a period of 180 days in order to allow time for Loral's existing DTH customers to transition to other service providers."[50] On March 4, 2004, the Bureau issued a Supplemental Order clarifying the date by which the parties must notify Loral's customers that certain services are to be provided pursuant to an STA.[51]

## II. THE BUREAU ERRONEOUSLY CONCLUDED THAT INTELSAT'S ACQUISITION OF LORAL'S DOMESTIC SATELLITES WOULD NOT HARM COMPETITION IN THE MARKET FOR DOMESTIC SATELLITE SERVICES PROVIDED TO THE U.S. GOVERNMENT.

SES AMERICOM demonstrated in its Comments and Reply Comments that, unless the FCC imposes appropriate conditions on its approval of Intelsat's acquisition of Loral's domestic satellites, Intelsat will have the ability and incentive to harm competition in the market for domestic satellite services provided to the U.S. Government. The Bureau, however,

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[48] *Id.* at ¶ 64.

[49] *Id.*

[50] The Bureau also stated that the parties could wait to consummate the transaction until the completion of Intelsat's IPO, and thereby avoid the strictures of Section 602 altogether, if they believed that such a delay would be "manageable." *Id.* at ¶¶ 64-65.

[51] *Loral Satellite, Inc. (Debtor-in-Possession) and Loral SpaceCom Corporation (Debtor-in-Possession), Assignors and Intelsat North America, LLC, Assignee, Applications for Consent to Assignments of Space Station Authorizations and Petition for Declaratory Ruling under Section 310(b)(4) of the Communications Act of 1934, as Amended*, Supplemental Order (Mar. 4, 2004).

dismissed SES AMERICOM's concerns virtually with the back of its hand. In fact, the Bureau's "analysis" is so brief that a reader is left having to guess as to the foundations on which it rests.

### A. *The Bureau's Conclusion That The Acquisition Will Not Harm Competition Conflicts With Decisions By The Federal Antitrust Enforcement Authorities And The Commission Itself.*

The sole guidance the Bureau provides is that, "[b]ecause the firms are not earning more than a competitive rate of return on domestic services, we do not find that the proposed transaction will provide an opportunity for a vertical foreclosure strategy."[52] The rationale for this conclusory language is never explained, and it is far from self-evident that a competitive return in the downstream market (*i.e.*, the domestic satellite market) must necessarily mean that no anticompetitive effect is possible.

In reaching its conclusion, the Bureau apparently relied upon an outdated antitrust doctrine that is now well recognized as having so many exceptions that the exceptions basically swallow the rule.[53] During the 1980s, federal antitrust enforcement authorities pursued little or no vertical merger or restraint cases, often relying on what is known as the "single monopoly profit theory" to justify lesser levels of enforcement. Under this theory, a monopolist in one market has no incentive to acquire a monopoly in an adjacent market because, the argument goes, it can obtain all of the monopoly profits in its original market. But it is now well understood that this argument requires numerous strong assumptions that are often not true,[54] and they are clearly not true here.

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[52] *Order* at ¶ 30.

[53] *See* Joseph Farrell & Philip J. Weisner, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 Harv. J.L. & Tech 85, at 105 (2003).

[54] *See id.*

Federal antitrust enforcement in the vertical area has moved far beyond the overly restrictive view of the 1980s. Economic understanding has grown significantly and has impacted the enforcement decisions of the antitrust agencies.[55] Challenges to vertical mergers by the Department of Justice (the "DOJ") and the Federal Trade Commission (the "FTC") have been much more extensive over the last 10 years,[56] including by the current administration.[57] Several such cases are virtually indistinguishable from the instant one, as they involve a monopoly input supplier (here, Intelsat for certain non-competitive international routes) and several downstream or adjacent market competitors (here, the existing domestic suppliers SES AMERICOM, PanAmSat and Loral).

The DOJ, for example, sued to block Lockheed's acquisition of Northrop Grumman in 1998 because, *inter alia*, the acquisition would leave the merged firm as the only supplier of numerous subsystems for certain military aircraft and ships, and the DOJ feared that Lockheed would deny its platform competitors access to these critical subsystems, or provide them in a discriminatory fashion.[58] Similarly, in 1997 the DOJ required a divestiture in connection with Raytheon's acquisition of the Texas Instruments' defense electronics business.[59]

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[55] *See* Thomas B. Leary, The Essential Stability of Merger Policy in the United States, Remarks before the Joint U.S./E.U/ Conference on Guidelines for Merger Remedies: Prospects and Principles, at 25 (January 17, 2002), *available at* http://www.ftc.gov/speeches/leary/learyuseu.htm.

[56] *See* ABA Section of Antitrust Law, *Antitrust Law Developments* at 364-65 nn.302-03 (5th ed. 2002).

[57] *See, e.g.*, *Biovail Corp.*, 2002 W.L. 1944313 (F.T.C. 2002); FTC Seeks to Block Cytyc Corp.'s Acquisition of Digene Corp., *available at* http://www.ftc.gov/opa/2002/06/cytyc_digene.htm (Jun. 24, 2002);

[58] *See* Verified Complaint, at 35-36, ¶¶ 106-109, *United States v. Lockheed Martin Corp.*, 1998 WL 306755 (D.D.C. 1998) (No. CivA1:98CV00731EGS).

[59] *See United States v. Raytheon Corp.*, 1997 W.L. 811048, at *3 (D.D.C. 1997).

Absent the divestiture, the DOJ concluded that Raytheon would have been a monopoly input supplier for certain highly sophisticated military radar systems, and would have had the incentive and ability to deny the monopoly input to competing radar suppliers or provide it on discriminatory terms.[60] As with the Lockheed transaction, the DOJ was concerned that the vertical aspects of the merger would increase prices to the DOD.[61]

More recently, the FTC required Biovail to divest an exclusive patent license it had recently acquired that allegedly was necessary for the production and sale of an anti-anxiety drug and its generic equivalents.[62] Biovail was the producer of the branded drug and was about to be subjected to generic entry when it acquired exclusive rights to the patent.[63] Thus, the patent constituted a monopoly input which would have been applicable to a competitive downstream market absent the acquisition.

But perhaps the most interesting cases for our purposes involve mergers in the cable industry -- AOL/Time Warner and Time Warner/Turner. With respect to the former transaction, both the FTC and the FCC imposed conditions on the parties in order to obtain regulatory approval. The FCC in particular was concerned that Time Warner's cable business would have the ability and incentive to disadvantage or refuse access to AOL's ISP competitors.[64] Similarly, the FTC in the Time Warner/Turner case was concerned about Time

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[60] *See* Complaint, at ¶ 23, *Raytheon Corp.* (No. 97-1515).

[61] *Id.* at ¶ 26.

[62] *See Biovail Corp.*, 2002 W.L. 1944313 (F.T.C. 2002).

[63] *See id.* at ¶¶ 1, 12-15.

[64] *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, Memorandum Opinion and Order, 16 F.C.C.R. 6547, 6484-85 (2001).

Warner's incentives to foreclose unaffiliated cable programming services from its cable systems.[65] These concerns are almost indistinguishable from the concerns raised by SES AMERICOM. In all of these cases, there is a firm with substantial market power in one market, and there is an adjacent competitive market. The fact that the adjacent market was competitive had no bearing on the FCC or FTC decisions in AOL/Time Warner and Time Warner/Turner. Nor should that fact matter here.[66]

### B. *Even Under the Outdated Economic Theory Apparently Relied Upon By the Bureau, the Bureau's Conclusions Are Erroneous.*

Even if the Commission concludes that a decade of Federal antitrust enforcement has been wrong-headed -- and that the FCC was guilty of similar miscues in Time Warner/Turner and elsewhere – that conclusion would still be irrelevant to the instant matter. Assume, *arguendo*, that the thinking of the most ardent adherents to the classical Chicago School single monopoly profit doctrine have been frozen in time and their minds have been unaffected by twenty years of advancements in economic learning. Even under these unlikely circumstances, the members of that prominent group of antitrust scholars have always recognized at least one exception to the single monopoly profit argument: evasion of rate regulation. The basic assumption of the single monopoly profit argument is that the monopolist

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[65] *See In the Matter of Time Warner, Inc.*, 123 F.T.C. 171, at *15, ¶ 38 (1997); *see also id.* at *55-56 (Statement of Chairman Pitofsky, and Commissioners Steiger and Varney).

[66] It is of no import that the DOJ did not seek to block Intelsat's acquisition of Loral's satellites. As SES AMERICOM explained in its Reply Comments, given the nature of the DOJ's antitrust review process, it is far from clear that the early termination was a focused DOJ decision with respect to Federal Government procurement. *See* Reply Comments at 15, n. 36. In any event, whatever the meaning of the DOJ's early termination decision, the FCC has an independent obligation under the ORBIT Act and the Communications Act to consider the implications of the acquisition on competition in the United States. *See id.* Indeed, the FCC has expertise that the DOJ and FTC do not possess, in identifying Intelsat's non-competitive "thin routes" and applying dominant carrier regulation to service on those routes.

can obtain all of the monopoly profit in its primary market. Where regulation prevents that from happening, however, serious scholars and commentators across the ideological spectrum have consistently recognized that vertical integration through merger or otherwise does provide an incentive for anticompetitive foreclosure. This rationale was in fact the basis for William Baxter, as head of the Antitrust Division, pushing to break up AT&T and signing the Modified Final Judgment.[67]

There are at least two types of rate regulation that can be evaded through vertical integration. One relates to rate of return regulation and the other relates to regulatory restraints on rates themselves. The latter category is at play here. Intelsat concedes that it "voluntarily made additional price commitments on thin routes, including annual rate reductions for switched voices, and rate caps for private line service with no future rate increases."[68] These types of rate regulation are exactly the type that can be evaded by vertical merger.[69]

Clearly, Intelsat will not argue that it is currently charging anywhere near the full monopoly price for these services, and it concedes that FCC orders preclude it from doing so. Thus, it cannot recover the full monopoly profit on its thin international routes. The acquisition of Loral's domestic satellite business coupled with a vertical foreclosure strategy, however, would give Intelsat the ability to recover on domestic service the monopoly rents that it is precluded from collecting on its thin international routes by virtue of FCC regulation.

Moreover, in this context, the Bureau's argument that a competitive downstream market ensures no anticompetitive foreclosure from the merger is exactly backwards (assuming

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[67] *See also* U.S. Dep't of Justice, Merger Guidelines § IV.3 (1982), *reprinted in* 4 Trade Reg. Rep. (C.C.H.) at 13, 102.

[68] *Opposition of Intelsat North America, LLC*, at 8-9.

[69] Joseph Farrell & Philip J. Weisner, *supra* note 53, at 105-106.

the validity of the single monopoly profit argument). Where the upstream monopoly price is competitive by regulation, and the downstream market is monopolized, one could argue that the only monopoly profit to be earned had already been earned, and no further competitive damage is possible from vertical integration. Where the downstream market is perfectly competitive, in contrast, the full amount of the monopoly overcharge remains to be had, which provides the vertically integrating firm with the incentive to increase price more than otherwise.

In sum, far from supporting Intelsat's contention that the conditions proposed by SES AMERICOM are unnecessary to protect competition, the existing caps on Intelsat's rates in some markets provide the backdrop for SES AMERICOM's concerns; the proposed conditions are necessary to protect those safeguards. The Bureau's conclusion that Intelsat's acquisition of Loral's satellites will not adversely affect competition in the market for U.S. Government services is therefore legally and factually erroneous.[70] The Bureau's refusal to apply the requested conditions also involves the Bureau's impermissible attempt to resolve, on delegated authority, "a question of law or policy which has not previously been resolved by the Commission."[71] Accordingly, the Commission should reverse the Bureau's decision.

### C. *The Bureau Erroneously Concluded That The U.S. Government Could Design Procurement Mechanisms That Are Adequate To Protect Competition.*

The Bureau also based its refusal to adopt the proposed conditions on the erroneous assumption that "U.S. Government agencies can design procurement procedures to address the concerns raised by SES AMERICOM on their behalf."[72] But relying on the U.S. Government to protect itself from anticompetitive conduct is no different from claiming that

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[70] *See* 47 C.F.R. § 1.115(b)(2)(i), (iv).

[71] *Id.* § 1.115(b)(2)(ii).

[72] *Order* at ¶ 31.

monopolies are not bad simply because customers can choose not to buy the monopolist's products. It is the Commission that has the affirmative, independent obligation under the Communications Act to protect the public interest. It is also the Commission that is charged with enforcing the competition-protection mandates of the ORBIT Act. The Bureau's abdication of the FCC's obligation to protect competition, and its reliance on safeguards to be implemented by the very customers that the Commission is required to protect, are unfounded and unprecedented.

It may be true that, in some cases, U.S. Government agencies can opt to buy services on an unbundled basis, buy from other suppliers, or impose restrictions on Intelsat's ability to engage in anticompetitive conduct. But those possibilities cannot constrain the Commission from imposing appropriate conditions to prevent anticompetitive conduct. Clearly, the U.S. Government should not be denied the efficiencies that undoubtedly arise from purchasing certain services on a bundled basis or from particular suppliers, simply because the Commission is unwilling to take steps to protect competition. In addition, as SES AMERICOM explained in its Reply Comments, without the pricing transparency and non-discrimination afforded by the proposed safeguards, Intelsat's anticompetitive pricing and conduct will be difficult or impossible for its customers to detect and guard against.[73] It is therefore erroneous for the Bureau to leave it to U.S. Government agencies to protect themselves.

In sum, none of the assumptions upon which the Bureau based its refusal to apply the conditions proposed by SES AMERICOM can bear scrutiny.[74] Accordingly, the

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[73] Reply Comments at 16-17.

[74] The only other stated basis for the Bureau's decision in this regard is its claim that "we do not believe that the acquisition of the [Loral] satellites by Intelsat will increase the market power of the merged company in any relevant market" because "we do not find that the transaction will cause concentration to rise in any individual domestic product or geographic

Commission must reverse the Bureau's decision, and modify the *Order* to include the proposed conditions.

## III. THE BUREAU WAS WITHOUT POWER TO GRANT SPECIAL TEMPORARY AUTHORITY TO PERMIT INTELSAT TO PROVIDE ADDITIONAL SERVICES PRIOR TO THE COMPLETION OF ITS IPO.

In the Order, the Bureau also concluded that Section 602(a) of the ORBIT Act explicitly prohibits Intelsat from providing "additional services" until it completes its IPO. Nevertheless, the Bureau granted to Intelsat an STA to continue providing such additional services to former Loral customers for 180 days after the consummation of the assignment.[75] In doing so, the Bureau relied upon authority granted to it in Sections 4(i), 303(r), and 309(f) of the Communications Act of 1934, as amended.[76] Those provisions, however, do not empower the Bureau to authorize services that are otherwise expressly prohibited by statute. The Bureau's utilization of an STA to circumvent the restrictions imposed by the ORBIT Act is therefore unlawful. The Commission must vacate the grant of the STA, and must do so on an expedited basis to avoid a violation of the ORBIT Act, and to prevent the issue from becoming moot.

The first provision upon which the Bureau relied, Section 4(i), delegates general authority to the Commission to take discretionary action, "not inconsistent with the Act," that is necessary for the Commission to execute its functions.[77] As the plain language of this provision

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market." *Order* at ¶ 32. However, SES AMERICOM has not claimed that the acquisition will increase concentration in any market, but that it will allow Intelsat to use its dominance in one market – for international services -- to eliminate competition in the market for certain domestic services provided to the U.S. Government. Accordingly, the Bureau's analysis of the effects of the acquisition on concentration has no bearing on SES AMERICOM's concerns.

[75] *Order* at ¶¶ 63-66.

[76] *Id.* at ¶ 75.

[77] 47 U.S.C. § 154(i).

suggests, actions "not inconsistent with the Act" are actions that conform to limitations contained elsewhere in the Communications Act. The remaining two provisions, sections 303(r) and 309(f), also contain similar limitations on the Commission's licensing authority. Section 303(r) provides that the Commission may only prescribe conditions and restrictions that are "not inconsistent with law."[78] Likewise, Section 309(f), which serves as the Commission's primary authority for granting STAs, directs that grant of an STA is proper only where it is "otherwise authorized by law."[79] Read together, these provisions clearly deny the Commission any discretion to grant interim relief in the form of an STA where the Commission is not otherwise authorized by law to do so, or (at the very least) where doing so would be directly contrary to other laws.

Permitting Intelsat to provide additional services prior to completion of its IPO plainly flouts the ORBIT Act. On its face, Section 602(a) of the ORBIT Act declares that Intelsat and its successor entities "*shall not be permitted* [by the Commission] to provide additional services" pending the completion of its privatization in accordance with statutory

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[78] 47 U.S.C. § 303(r).

[79] Section 309(f) provides in full:

> When an application subject to subsection (b) of this section has been filed, the Commission, notwithstanding the requirements of such subsection, may, if the grant of such application is otherwise authorized by law and if it finds that there are extraordinary circumstances requiring temporary operations in the public interest and that delay in the institution of such temporary operations would seriously prejudice the public interest, grant a temporary authorization, accompanied by a statement of its reasons therefor, to permit such temporary operations for a period not exceeding 180 days . . .

47 U.S.C. § 309(f).

requirements.[80] Similarly, Section 621(4) provides that "[d]uring the transition period prior to privatization under this title, INTELSAT . . . *shall be precluded* from expanding into additional services."[81] This language -- "shall not be permitted" and "shall be precluded from" – does not merely suggest that Intelsat and its successors should not be allowed to provide additional services pending full privatization; it affirmatively directs the Commission to prevent or stop Intelsat from doing so. Lest there be any doubt or ambiguity as to this affirmative obligation of the Commission, the ORBIT Act provides further that "[t]he Commission shall take all necessary measures to implement this requirement, including the denial by the Commission of licensing for such services."[82] The obligations imposed on the Commission are therefore mandatory.[83]

Nowhere else in the Orbit Act did Congress include any qualifying or excepting language. Moreover, although Section 601(b)(1)(D) of the ORBIT Act has been construed as "providing the Commission discretion to authorize Intelsat LLC services pending Intelsat, Ltd.'s conducting an IPO within the timeframe provided in the ORBIT Act,"[84] there is no statutory basis to construe this provision to be a general grant of discretionary authority for the Commission also to authorize "additional services" otherwise prohibited by Section 602(a). Section 601(b)(1)(D) merely provides that none of the competition criteria encompassed in 601(b) is intended to prevent the Commission from acting upon applications of Intelsat to

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[80] ORBIT Act, § 602(a) (emphasis added).

[81] *Id.* at § 621(4) (emphasis added).

[82] *Id.* at § 602(a).

[83] *See Plaut v. Spendthrift Farm, Inc.*, 1 F.3d 1487, 1490 (6th Cir. 1999) ("Where the word 'shall' appears in a statutory directive, Congress could not have chosen stronger words to express its intent that [the specified action] be mandatory" (quoting *U.S. v. Monsanto*, 491 U.S. 600, 607 (1989)).

[84] *Order* ¶ 60, citing *Intelsat LLC ORBIT Act Compliance* Order at 12288.

provide service prior to privatization.[85] This does not in any way negate the force of the prohibition in Section 602(a).

In addition to being inconsistent with the ORBIT Act's plain meaning, the grant of the STA conflicts with the underlying purpose of the statute, which is to "leverag[e] access by INTELSAT to the most lucrative telecommunications market in the world [in] the United States as an incentive to achieve a rapid pro-competitive privatization."[86] By permitting Intelsat to offer additional services pending its IPO, even for a limited purpose and for a limited time, the Bureau has diminished much of the leverage that Congress intended for the Commission to use to encourage Intelsat to complete its IPO.[87] Indeed, the Bureau's action gives away precisely what Congress stated it intended to hold in reserve: "the ability [of Intelsat] to expand [its] market presence and solidify a broader customer base" prior to its privatization.[88]

Nor was the Bureau's grant of an STA by any means a necessary or even typical means of requiring an applicant to divest prohibited services. When a proposed merger would result in an applicant's providing services that are otherwise prohibited by law, such that the applicant must divest itself of particular customers or services, the Commission generally

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[85] ORBIT Act, § 601(b)(1)(D).

[86] Senate Committee on Commerce, Science, and Transportation, Sen. Rep. No. 106-100, at 2 (Jun. 30, 1999).

[87] Although the Commission has previously determined that the purpose of the ORBIT Act is not to "penalize" Intelsat by delaying its access to the U.S. market, pending its IPO, where its privatization is otherwise consistent with the Act's criteria, *see Order* at ¶ 60 (citing *Intelsat LLC ORBIT Act Compliance Order*, 16 FCC Rcd at 1288, ¶ 24.), it is also clear that the purpose of the Act is not to reward Intelsat for its repeated failures to complete the privatization process in a timely fashion.

[88] Sen. Rep. No. 106-100, at 2.

requires that the divestiture occur prior to the closing of the transaction, rather than afterwards.[89] The applicants have provided no compelling reason for the Commission to depart from such precedent here. Indeed, in granting the STA, the Bureau has impermissibly exercised its delegated authority to resolve "a question of law or policy which has not previously been resolved by the Commission."[90]

Because the Bureau exceeded its statutory and delegated authority in granting the STA, SES AMERICOM requests that the Commission vacate that portion of the Order, and prohibit Intelsat from providing additional services until completion of its IPO. This would require the parties either to divest the prohibited customers and services prior to the consummation of the acquisition, or to delay the closing until Intelsat conducts its IPO.

Furthermore, as set forth in the accompanying Motion for Expedited Consideration In Part, SES AMERICOM requests that the Commission immediately vacate the STA. The applicants could consummate the acquisition at any time, thus commencing Intelsat's provision of DTH services for the six-month period of the STA. The Commission must act expeditiously to prevent Intelsat's provision of such additional services prior to its IPO, in violation of the ORBIT Act. Immediate action by the Commission is also required to ensure that this important matter is not mooted by the passage of the six-month period of the STA.

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[89] *See, e.g., Qwest Communications International Inc. and U.S. West, Inc., Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 11,909 (2000)

[90] 47 C.F.R. § 1.115(b)(2)(ii).

## IV. CONCLUSION

For the foregoing reasons, SES AMERICOM requests that the Commission modify the Bureau's Order to adopt the conditions proposed by SES AMERICOM. SES AMERICOM further requests that the Commission vacate, on an expedited basis, the Bureau's grant of the STA for additional services.

Respectfully submitted,
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March 12, 2004

## CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March 2004, I caused a copy of the foregoing Application for Review to be served by U.S. First-Class Mail, postage prepaid, on the following:

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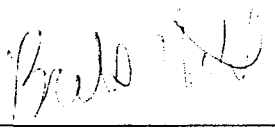

Brett M. Kitt

# APPENDIX B

Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Loral Satellite, Inc. | ) | |
| (Debtor-in-Possession) and | ) | |
| Loral SpaceCom Corporation | ) | |
| (Debtor-in-Possession), | ) | |
| Assignors, | ) | File Nos. SAT-ASG-20030728-00138 |
| | ) | SAT-ASG-20030728-00139 |
| and | ) | |
| | ) | |
| Intelsat North America LLC, | ) | |
| Assignee, | ) | |
| | ) | |
| Applications for Consent to Assignments of Space Station Authorization | ) | |

To: The Commission

**MOTION FOR EXPEDITED CONSIDERATION IN PART OF APPLICATION FOR REVIEW**

SES AMERICOM, Inc. ("SES AMERICOM"), by its attorneys and pursuant to Section 1.41 of the Rules of the Federal Communications Commission (the "Commission"),[1] hereby requests expedited consideration in part of the Application for Review enclosed herewith. In particular, SES AMERICOM requests that the Commission immediately vacate the unlawful grant by the International Bureau (the "Bureau") to Intelsat of Special Temporary Authority ("STA") to provide direct-to-home ("DTH") services prior to completion by Intelsat of its initial public offering ("IPO"). The Bureau issued the STA in its Order and Authorization dated February 11, 2004 (the "Order"),[2] by which it granted the applications of Loral Satellite Inc.,

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[1] 47 C.F.R. § 1.41.

[2] *Loral Satellite, Inc. (Debtor-in-Possession) and Loral SpaceCom Corporation (Debtor-in-Possession), and Intelsat North America, LLC, Applications for Consent to Assignment of*

Loral SpaceCom Corporation (together "Loral"), and Intelsat North America, LLC ("Intelsat") to assign to Intelsat certain space station licenses held by Loral.

As fully explained in the enclosed Application for Review, the Bureau was clearly without statutory authority to grant the STA.[3] The Open-market Reorganization for the Betterment of International Telecommunications Act (the "ORBIT Act")[4] expressly provides that the Commission shall not permit Intelsat to offer "additional services,"[5] which are defined to include DTH services,[6] until Intelsat has completed its IPO. Because Intelsat has not yet conducted its IPO, and the FCC is not vested with statutory authority to exempt compliance with the ORBIT Act in this respect, the Bureau's grant of STA was contrary to law and must be vacated by the Commission.

Having obtained authorization from the Bureau to complete the acquisition, and notwithstanding the pendency of SES AMERICOM's Application for Review, Intelsat and Loral could move to consummate the transaction at any time, thereby commencing Intelsat's provision of DTH service to Loral's former customers, in violation of the ORBIT Act. SES AMERICOM therefore requests that the Commission act immediately on the request to vacate the STA, to prevent this clear violation of the ORBIT Act. Expedited review is also required to ensure that

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*Space Station Authorizations and Petition for Declaratory Ruling under Section 310(b)(4) of the Communications Act of 1934, as Amended*, DA 04-357, File Nos. SAT-ASG-20030728-00138, SAT-ASG-20030728-00139, Order and Authorization (Feb.11, 2004).

[3] *See* 47 C.F.R. § 1.115(b)(2)(i). *See also id.* § 1.115(b)(2)(ii) (Bureau on delegated authority may not resolve "a question of law or policy which has not previously been resolved by the Commission").

[4] ORBIT Act, Pub. L. No. 106-180, 114 Stat. 48 (2000), as amended, Pub. L. No. 107-233 § 1, 116 Stat. 140, codified at 47 U.S.C. § 646 *et seq.* (2002).

[5] ORBIT Act, § 602(a).

[6] *Id.* § 681(a)(12)(B).

SES AMERICOM's request is not rendered moot by the passage of the six-month period of the STA.[7]

Immediate vacatur of the STA will require Intelsat to comply with the ORBIT Act by either delaying the consummation of the acquisition of the Loral assets until completion of Intelsat's IPO, or divesting the prohibited customers of Loral's DTH services prior to the closing. The Commission has a statutory obligation to enforce such ORBIT Act compliance, and must fulfill that obligation by acting immediately to reverse the Bureau's unlawful STA grant.

For the foregoing reasons, SES AMERICOM requests that the Commission act immediately to vacate the Bureau's grant of the STA.

Respectfully submitted,
SES AMERICOM, Inc.

By: _____

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March 12, 2004

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[7] *See, e.g. Dow Jones & Co. v. Kaye*, 256 F.3d 1251, 1257-58 (11th Cir. 2001) (finding that the parties' request for expedited treatment could have enabled the court to resolve the case before it became moot).

## CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March 2004, I caused a copy of the foregoing Motion for Expedited Consideration in Part of Application for Review to be served by U.S. First-Class Mail, postage prepaid, on the following:

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# APPENDIX C

Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Inmarsat Ventures Limited | ) | File No. SAT-MSC-20040210-00027 |
| | ) | |
| | ) | |

To: The Commission

# COMMENTS OF SES AMERICOM, INC.


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April 5, 2004

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## SUMMARY

SES AMERICOM hereby comments on Inmarsat's Letter claiming that Inmarsat has complied with the requirement of the ORBIT Act that Inmarsat conduct an initial public offering of its securities to achieve a substantial dilution of its former ownership interests. In its Letter, Inmarsat declares its compliance with the foregoing pursuant to a series of transactions through which Inmarsat acquired and redistributed much of its equity interests to new shareholders, and then financed this acquisition through the public offering of debt securities on the Luxembourg Stock Market, and in the near future, on the PORTAL market in the United States. For several reasons, SES AMERICOM believes that Inmarsat's claims of compliance are unfounded, and it urges the Commission to find the same.

The debt and equity transactions undertaken by Inmarsat fail to conform to the IPO process delineated by Congress in the plain language of the ORBIT Act. Although the ORBIT Act does not expressly require an IPO of "stock," the terms chosen by Congress to describe the offering process, such as "shares," "ownership," and even "initial public offering," have ordinary meanings that suggest Congress desired for Inmarsat to conduct an equity IPO, rather than the debt offering it is undertaking instead. This conclusion is bolstered by both the legislative history of the ORBIT Act and statements of key Members of Congress.

Inmarsat attempts to circumvent the statutory strictures by claiming that its transactions, although different from what is explicitly required by the ORBIT Act, are nonetheless "consistent with" the ORBIT Act. Although the ORBIT Act provides for a "consistent with" standard of review to evaluate Inmarsat's progress toward privatization, Inmarsat should not be permitted to evade the policy objectives of the legislation, especially when the ORBIT Act itself offers a means of accommodating Inmarsat's concerns regarding an equity IPO.

Even under a lesser standard of review, moreover, there are several compelling reasons for the Commission to conclude that Inmarsat's actions are inconsistent with the IPO process delineated by the ORBIT Act.

First, the equity restructuring described by Inmarsat did not achieve the substantial dilution of Inmarsat equity envisioned by Congress. Although Inmarsat has transferred much of its equity interests to new shareholders, it has not diversified its ownership, as is typical of an equity IPO. Instead, the equity transaction actually consolidated ownership and control of the company into the hands of two shareholders: Permira and Apax Partners.

Second, the transactions did not transform Inmarsat into a publicly held company, as is the natural result of an equity IPO. Inmarsat's equity is not publicly traded on any stock exchange, and in fact, because of substantial restrictions on the transfer of its equity, there is arguably no private market for Inmarsat shares either. Although there is now a public market for Inmarsat's debt securities, a debt offering does not distribute corporate ownership to the public, and therefore cannot transform Inmarsat into a public company.

Third, the oversight and transparency mechanisms to which Inmarsat is subject as a result of its debt offering are not comparable to those envisioned by the ORBIT Act. Had Inmarsat conducted an equity IPO on a U.S. stock exchange, it would have been subject to listing requirements relating to corporate governance that would have furthered Inmarsat's transformation into an independent commercial entity. Inmarsat does not appear to be subject to these requirements under the regulatory regimes it has chosen to govern its debt offering.

In summary, Inmarsat failed to satisfy the IPO requirements of the ORBIT Act, and failed to demonstrate that it has established an ownership structure "consistent with" these stated requirements. The Commission should thus reject Inmarsat's statement of compliance, and insist that Inmarsat comply (as it is still able to do) with the IPO requirement of the ORBIT Act.

Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554

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|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Inmarsat Ventures Limited | ) | File No. SAT-MSC-20040210-00027 |
| | ) | |
| | ) | |

To: The Commission

**COMMENTS OF SES AMERICOM, INC.**

SES AMERICOM, Inc. ("SES AMERICOM"), by its attorneys and pursuant to a Public Notice issued by the Federal Communications Commission (the "FCC" or the "Commission") on March 5, 2004,[1] hereby submits these Comments on the letter filed with the Commission by Inmarsat Ventures Limited ("Inmarsat") on February 10, 2004.[2]

## I. INTRODUCTION

### *A. SES AMERICOM*

SES AMERICOM and its subsidiaries provide U.S. and international satellite services through a fleet of geosynchronous satellites. SES AMERICOM is one of the largest U.S. providers of fixed satellite service ("FSS") transponder capacity, and SES AMERICOM's parent company, SES GLOBAL S.A., is the premier global FSS operator. Through its operating units, which also include its European-based subsidiary, SES ASTRA S.A., and its equity interests in satellite service providers in various

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[1] Public Notice Report No. SAT-00197.

[2] Letter from Alan Auckenthaler, Inmarsat, to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission (filed Feb. 10, 2004) (the "*Inmarsat Letter*").

locations, the SES GLOBAL family of companies competes with Inmarsat to provide satellite services to customers throughout the world.

*B.* *Inmarsat*

The International Maritime Satellite Organization ("Inmarsat") was established in 1978 as an intergovernmental organization ("IGO") charged with the development of a global maritime satellite system to service the commercial maritime and safety communications needs of the United States and other countries.[3] Inmarsat currently owns and operates a fleet of nine geostationary satellites.[4] It is a provider of global mobile satellite communications services to end users at sea, on land, and in the air. Its primary markets are for maritime and high-speed data services.[5]

As an IGO formed by international treaty, Inmarsat was, until recently, owned by the states that signed the treaty (the "Signatories"). Even after Inmarsat was restructured as a corporation in 1999, it maintained close ties to its Signatories, which became equity holders in the company. Over time, these affiliations became a source of concern among Inmarsat's competitors and government officials alike, who feared that Inmarsat enjoyed an unfair competitive advantage in its Signatories' markets.

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[3] *In the Matter of Comsat Corporation d/b/a Comsat Mobile Communications, et al.*, 16 FCC Rcd 21661, 21669 (2001) ("*Inmarsat Market Access Order*").

[4] *See Offering Memorandum of Inmarsat Finance plc for $375,000,000 of 7-5/8% Senior Notes due 2012* (filed at the Luxembourg Stock Exchange in February 2004), at 1 ("*Inmarsat Offering Memorandum*").

### C. *The ORBIT Act*

In 2000, the U.S. Congress passed the Open-market Reorganization for the Betterment of International Telecommunications Act (the "ORBIT Act").[6] The stated purpose of this Act was to "promote a fully competitive global market for satellite communication services for the benefit of consumers and providers of satellite services and equipment by fully privatizing the intergovernmental satellite organizations, INTELSAT and Inmarsat."[7] Congress sought to achieve this goal by directing the Commission to condition its grant of U.S. market access upon Inmarsat's satisfaction of specified criteria, including a determination that Inmarsat has fully privatized in a manner that does not harm competition in the telecommunications markets of the United States.[8]

To achieve privatization, Section 621 of the ORBIT Act requires that Inmarsat conduct an initial public offering ("IPO") of securities. The specific IPO requirements of Section 621 are as follows:

> (2) INDEPENDENCE. – The privatized successor entities and separated entities of INTELSAT and Inmarsat shall operate as independent commercial entities, and have a pro-competitive ownership structure. The successor entities and separated entities of INTELSAT and Inmarsat shall conduct an initial public offering in accordance with paragraph (5) to achieve such independence. Such offering shall substantially dilute the aggregate ownership of such entities by such signatories or former signatories. In

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[5] *See id.*

[6] ORBIT Act, Pub. L. No. 106-180, 115 Stat. 48 (2000) (codified as amended in scattered sections of 47 U.S.C.).

[7] *Id.* § 2.

[8] *Id.* § 601(b).

> determining whether a public offering attains such substantial dilution, the Commission shall take into account the purposes and intent, privatization criteria, and other provisions of this title, as well as market conditions.
>
> . . .
>
> (5) CONVERSION TO STOCK CORPORATIONS. -- Any successor entity or separated entity created out of INTELSAT or Inmarsat shall be a national corporation or similarly accepted commercial structure, subject to the laws of the nation in which incorporated, as follows:
>
> > (A) An initial public offering of securities of any successor entity or separated entity –
> >
> > . . .
> >
> > (ii) shall be conducted, for the successor entities of Inmarsat, on or about October 1, 2000, except that the Commission may extend this deadline in consideration of market conditions and relevant business factors relating to the timing of an initial public offering, but to no later than December 31, 2001.
> >
> > (B) The shares of any successor entities and separated entities shall be listed for trading on one or more major stock exchanges with transparent and effective securities regulation.[9]

As stated above, Congress set a December 31, 2001, deadline for the completion of the Inmarsat IPO.[10] It subsequently amended the ORBIT Act to extend the IPO deadline until June 30, 2004, with the possibility of a further extension until December 31, 2004.[11]

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[9] *Id.* § 621.

[10] *Id.* § 621(5)(A)(ii).

[11] ORBIT Technical Corrections Act of 2003, Pub. L. No. 108-39 (2003).

*D. Compliance with Non-IPO Privatization Criteria*

On September 24, 2001, the Commission determined that Inmarsat had implemented a plan of privatization "consistent with" the non-IPO privatization criteria specified in the ORBIT Act.[12] In support of this determination, the Commission cited Inmarsat's pre-ORBIT Act undertakings towards privatization, including its transfer of assets to a private U.K. company, in which shares were proportionally allocated to Inmarsat Signatories.[13] Furthermore, the Commission cited Inmarsat's post-ORBIT Act restructuring to ensure that no more than five of its thirteen directors are affiliated with former Inmarsat Signatories, and that no officer or manager owns more than a *de minimis* financial interest in a former Signatory.[14]

Pursuant to this determination, the Commission authorized Inmarsat to provide certain services to, from, and within the United States.[15] This grant of authority was made subject to a future finding of the Commission that "Inmarsat has conducted an IPO under Sections 621(2) and 621(5)(A)(ii) of the ORBIT Act."[16] The Commission

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[12] *See Inmarsat Market Access Order*, 16 FCC Rcd at 21694. These non-IPO criteria include the requirement that Inmarsat establish a corporate structure with a board of directors and a set of officers independent of its Signatories. *See* ORBIT Act, § 621(5)(C).

[13] *Inmarsat Market Access Order*, 16 FCC Rcd at 21687.

[14] *See id.* at 21688-90.

[15] *See id.* at 21711.

[16] *See id.* at 21712.

required Inmarsat to file, "within 30 days after the conduct of its IPO a demonstration that the IPO is in compliance with Section 621(2) and 621(5)(A)(ii) of the ORBIT Act."[17]

*E. The Transactions*

On February 10, 2004, Inmarsat filed a letter with the Commission purporting to demonstrate that it had satisfied the IPO requirements of the ORBIT Act by effectuating two transactions.[18] The first transaction involved the transfer of Inmarsat's existing equity interests to mostly new shareholders (the "Equity Transaction"), while the second transaction involved the financing of the Equity Transaction through a public offering of 7 5/8% notes (the "Debt Transaction," and together with the Equity Transaction, the "Transactions").[19]

*1. The Equity Transaction*

According to the *Inmarsat Letter*, on December 17, 2003, funds advised by Apax Partners and Permira (both advisors of pension funds, endowments, and other institutions) together acquired a 52.28% equity interest in Inmarsat.[20] Pursuant to this purchase, and a concurrent corporate restructuring involving the creation of Inmarsat Group Holdings Limited ("Inmarsat Group Holdings"), which is the new parent company for all Inmarsat businesses, the Equity Transaction resulted in Apax Partners and Permira

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[17] *See id.*.

[18] *See Inmarsat Letter*.

[19] *See id.* at 2.

[20] *See id.* at 2-3.

each receiving a 26.14% equity stake in Inmarsat Group Holdings.[21] Certain members of Inmarsat management also received a 4.75% ownership interest, resulting in 57% of Inmarsat being held by new, non-Signatory shareholders.[22] Meanwhile, several former shareholders of Inmarsat, including COMSAT Investments, Inc., Telenor Satellite Services AS, and KDDI Corporation, chose to reinvest in the company; they each received 14.1%, 15.1%, and 7.62% ownership interests, respectively.[23]

*2. The Debt Transaction*

In order to facilitate the financing of the Equity Transaction, the parties arranged for a bridge loan in the amount of $365 million.[24] On February 3, 2004, Inmarsat Finance plc, a wholly-owned, indirect subsidiary of Inmarsat Group Holdings, conducted a "public offering" of 7 5/8% Senior Notes (the "Notes"), with a maturity date of June 30, 2012, in order to repay the bridge loan.[25] Inmarsat has stated that it intends to

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[21] *Id.* According to Inmarsat, two classes of shares were created by the Equity Transaction. Class A shares, which comprise a small portion of the issued and outstanding shares, are held by directors and employees of Inmarsat. Class B shares are those held by Apax Partners and Permira. Neither Apax Partners nor Permira are permitted to transfer their Class B shares except where the transfer, subject to tag along and drag along rights afforded to minority investors, would result in a party other than Apax Partners and Permira holding more than 50% of the issued ordinary shares of Inmarsat Group Holdings. Similarly, other holders of Class B shares are required to obtain the prior written consent of a director appointed by Apax Partners and Permira prior to transferring their shares, and are prohibited from transferring shares to a competitor of Inmarsat or a supplier. *See Inmarsat Offering Memorandum*, at 125-26.

[22] *Inmarsat Letter* at 3.

[23] *Id.* at 3 n.10.

[24] *Id.* at 4.

[25] *Id.*

file with the U.S. Securities and Exchange Commission ("SEC") a registration statement on Form-4 for the issuance of the Notes.[26] According to Inmarsat, it expects to file this document by June, 2004, if not sooner, but in no event later than August 1, 2004.[27] Once the registration statement becomes effective, the Notes will be eligible for trading on the Private Offering, Resales and Trading Automatic Linkages ("PORTAL") Market in the United States.[28] The Notes have already been listed on the Luxembourg Stock Exchange.[29]

### F. *Inmarsat's Argument that the Transactions Satisfy Its IPO Obligations*

According to Inmarsat, the Transactions, when analyzed as an integrated whole, are "consistent with" the IPO requirements of the ORBIT Act.[30] As a general matter, Inmarsat alleges that the language of the ORBIT Act permits an offering of debt securities to be treated as the required "initial public offering" because Section 621 of the ORBIT Act requires only that Inmarsat conduct an initial public offering of "securities," without specifically mentioning either debt or equity securities.[31] The term "security," Inmarsat argues, can be broadly defined to include both debt and equity instruments.[32]

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[26] *Id.* at 5.

[27] *Id.*

[28] *Id.*

[29] *See* Letter of Inmarsat Ventures Ltd. to the Federal Communications Commission (filed Mar. 8, 2004).

[30] *See Inmarsat Letter* at 7-15.

[31] *Id.* at 8.

[32] *See id.* at 8 n.27.

Inmarsat further argues that its Equity Transaction achieved a substantial dilution of the ownership interests of former Inmarsat securities as required by the ORBIT Act.[33]

With respect to the requirement of Section 621(5)(B) that Inmarsat's "shares" be listed on one or more stock exchanges with transparent and effective securities regulation, Inmarsat concedes that its Notes "technically may not be 'shares.'"[34] It nevertheless contends that it has acted consistently with Section 621(5)(B) by making its debt instruments publicly tradeable on both the Luxembourg Stock Exchange and the PORTAL market in the United States.[35] Inmarsat asserts that the Luxembourg Stock Exchange qualifies as a major exchange with disclosure requirements that include the filing of annual and semi-annual reports, including audited financial statements prepared in accordance with the International Financial Reporting Standards.[36]

Inmarsat also states that it intends to register its Notes with the SEC, and will thereby be subjected to the SEC's periodic reporting requirements for foreign issuers, including the filing of annual reports on Form 20-F, and interim reports on Form 6-K.[37] Finally, Inmarsat notes that, regardless of its legal obligation to file annual and interim reports with the SEC, it is contractually obligated to do so.[38]

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[33] *Id.* at 7-8.

[34] *Id.* at 9-12.

[35] *Id.* at 9-10.

[36] *See id.* at 11-12.

[37] *See id.* at 12-15.

[38] *Id.* at 15.

## II. THE COMMISSION SHOULD CONCLUDE THAT INMARSAT HAS NOT COMPLIED WITH THE ORBIT ACT.

Although Inmarsat appears to have transferred much of its ownership to non-Signatory investors, Inmarsat in doing so has addressed only one of several directives and policy objectives associated with the IPO requirements of the ORBIT Act. Inmarsat's Transactions fail to satisfy the legislative mandate that Inmarsat conduct an IPO of its equity securities and list those equity securities on a major stock exchange. Moreover, Inmarsat's Transactions are not "consistent with" the IPO requirements or their underlying policy objectives, as they do not diversify or create public ownership in the Company, do not subject Inmarsat to a level of regulatory oversight comparable to that which would occur under an equity IPO, and do not achieve Congress' vision of Inmarsat as a fully independent commercial entity.

The Commission should also reject these Transactions because their shortcomings are the product of Inmarsat's own design. If Inmarsat felt that persistent market conditions rendered compliance with the ORBIT Act impractical, it should have worked with the Commission to find a solution. Instead, Inmarsat chose to devise and implement an approach that defies the ORBIT Act, while asking the Commission to forgive its defiance after-the-fact. Such a tactic simply cannot not be condoned by the Commission, which should instruct Inmarsat to comply with the Act.

### *A. Inmarsat's Claims are Inconsistent with the Statutory Language and the Legislative History of the ORBIT Act.*

The plain language of the ORBIT Act offers the most direct rebuttal to Inmarsat's claim that it has satisfied the ORBIT Act's IPO requirements. Although Inmarsat is correct that Section 621 does not expressly require Inmarsat to undertake an IPO of "stock" or "equity" securities, the use of certain other terminology in the Act does

make it abundantly clear that Congress intended for Inmarsat's offering to be one of equity. First, the Act uses the term "initial public offering" to describe the required privatization process.[39] In its common usage, the term "initial public offering" does not connote an offering of debt, but rather a "corporation's first offering of *stock* to the public."[40]

Second, in Section 621(2) of the ORBIT Act, Congress several times refers to the IPO as being designed to achieve the dilution of aggregate "ownership" interests of Inmarsat's former signatories.[41] The description of an IPO as achieving a dilution of existing "ownership" interests in a company can only be a reference to an IPO of equity securities, which are the securities that connote ownership in a company; it could not have been a reference to debt securities, which do not establish any ownership.[42]

Third, Congress specifically required in Section 621(5)(B) of the ORBIT Act that "*shares*" of a privatized Inmarsat be listed for trading on one or more stock

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[39] ORBIT Act, §§ 621(2), (5)(A).

[40] Jack P. Friedman, Dictionary of Business Terms 297 (2d ed. 1994) (emphasis added). *See also* the NASDAQ Stock Market, *Going Public*, at 166 (2000), *available at* http://www.nasdaq.com/about/going_public.stm (defining an initial public offering (IPO) as "[a] company's first sale of stock to the public. Companies seeking outside equity capital and a public market for their stock will make an initial public offering").

[41] *See* ORBIT Act, § 621(2)

[42] *See generally Going Public*, *supra*, at 6 ("[b]y selling stock to shareholders, the original owners of a public company are, in essence, relinquishing exclusive control of the company's future"). *Compare* Black's Law Dictionary 200 (7th ed. 1999) (equity capital: "funds provided by a company's owners in exchange for evidence of ownership, such as stock") *with id.* at 410 (debt: "liability on a claim").

exchanges.[43] Although Inmarsat tries to portray the term "shares" as one that describes an allotment of any type of securities, the term, in its normal usage, has a meaning specific to only one type of security -- an equity or ownership interest in a company.[44] The notion that Congress intended for shares of equity interests in Inmarsat, rather than debt instruments, to be publicly listed, is consistent with the traditional understanding of an IPO as distributing ownership in a company by creating a liquid market for its equity on a stock exchange.[45]

The legislative history of the ORBIT Act further demonstrates that Congress intended for Inmarsat to conduct an equity IPO. In describing the privatization process for Intelsat -- which is subjected to substantially the same requirements as Inmarsat -- a Senate Committee report notes that the President will seek to ensure that an "initial public offering of *stock* of the privatized INTELSAT entity occurs in a timely fashion . . ."[46] The report further states that the Committee "intends to allow INTELSAT to proceed with a *public stock offering* in a manner consistent with normal business considerations."[47] Floor statements of several key members of Congress, made during

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[43] ORBIT Act, § 621(5)(B) (emphasis added).

[44] *See* Black's Law Dictionary, *supra,* at 1380.

[45] *See generally* Thomas Lee Hazen, 1 *Treatise on the Law of Securities Regulation* § 3.1[2] (4th ed. 2002).

[46] Senate Committee on Commerce, Science, and Transportation, Sen. Rep. No. 106-100, at 6 (Jun. 30, 1999) (emphasis added).

[47] *Id.* (emphasis added).

debate on the ORBIT Technical Corrections Act of 2003, are also instructive in this regard.[48]

In sum, it seems clear from both the language of the ORBIT Act and the legislative history -- that Congress specifically intended for Inmarsat to achieve privatization through an initial public offering of its equity securities, and the subsequent public listing of those equity securities on one or more major stock markets. Because Inmarsat did not follow these prescribed procedures, it has clearly not complied with the IPO requirements of the ORBIT Act.

### B. *The Standard of Review of the Inmarsat Transactions Should be Compliance With the Text of the ORBIT Act.*

In Section 601(b)(2) of the ORBIT Act, Congress required the Commission to determine that Inmarsat's privatization is "consistent with" the statutory criteria.[49] However, the Commission should not judge Inmarsat's compliance with the IPO requirements by any standard other than one of strict compliance, because there is no legitimate reason why Inmarsat cannot meet its full obligations under the text of the ORBIT Act. Although Inmarsat argues that its present course of action is necessitated by market conditions that are not conducive to an equity IPO,[50] such problems are neither

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[48] *See, e.g. Cong. Rec.* H5342 (daily ed. June 12, 2003) (statement of Rep. Dingell) (noting that an extension of the statutory IPO deadline is required so that Inmarsat and its investors would not be unfairly required to "risk capital by offering shares to the public at a time when such shares are likely to be undervalued – perhaps grossly undervalued"); *id.* at H5343 (statement of Rep. Tauzin) ("[i]f forced to move ahead with an IPO at this time, Inmarsat will probably receive a reduced price for its shares offered").

[49] ORBIT Act, § 601(b)(2).

[50] *See Inmarsat Letter* at 7.

new to Inmarsat, nor to the ORBIT Act.[51] The ORBIT Act expressly anticipates market fluctuations by granting flexibility to the Commission to extend the IPO deadline.[52] In the past, the Commission has been willing to accommodate Inmarsat's extension requests,[53] and there is no reason to believe that if current market conditions persist, it will not continue to do so.[54]

Moreover, Congress itself has proven willing to amend the ORBIT Act to extend the deadline further.[55] Accordingly, the system established by Congress is already sufficiently flexible to address Inmarsat's concerns, and there is no need for further flexibility. Indeed, while ongoing delays may prove frustrating to Inmarsat, such

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[51] Although Inmarsat asserts that market conditions for an IPO continue to be unfavorable, Inmarsat has not backed these claims up, as it has in the past, with a letter from its investment bankers advising against an IPO. *See, e.g. In the Matter of Inmarsat Ventures Ltd., Request for Additional Time under Section 621(5) of the ORBIT Act*, FCC-01-193 (released Jun. 28, 2001) at ¶ 19 ("*Inmarsat Request for Additional Time I*"); *In the Matter of Inmarsat Ventures Ltd., Request for Additional Time under Section 621(5) of the ORBIT Act*, FCC 00-356 (released Oct. 3, 2000) at ¶ 4 ("*Inmarsat Request for Additional Time II*"). In addition, Intelsat – facing the same market conditions – is nonetheless proceeding with an ORBIT Act-mandated IPO of equity securities. *See* Intelsat F-1 (filed at the Securities and Exchange Commission on Mar. 12, 2004); Press Release, Intelsat Ltd., Intelsat Ltd. Announces Planned Initial Public Offering (Feb. 4, 2004), *available at* http://www.intelsat.com/aboutus/press/release_details.aspx?year=2004&art=20040204_01_EN.xml&lang=en&footer=49/.

[52] ORBIT Act, § 621(A)(ii).

[53] *See, e.g. Inmarsat Request for Additional Time I*; *Inmarsat Request for Additional Time II.*

[54] As noted *supra*, the Commission is currently authorized by Congress to extend the deadline for Inmarsat's IPO until December 31, 2004.

[55] *See* ORBIT Technical Corrections Act of 2003, Pub. L. No. 108-39 (2003).

frustration should not afford it license to adopt a privatization program that is substantively different from the program designed by Congress.

### C. *The Inmarsat Transactions Are Not "Consistent" with an IPO of Equity Securities.*

Even if the Commission were to apply the "consistent with" standard to judge Inmarsat's compliance with the ORBIT Act, there are still several reasons as to why the Inmarsat Transactions are, in fact, not consistent with the ORBIT Act.

#### *1. The Equity Transaction did not Achieve a Substantial Dilution of Inmarsat Equity.*

First, Inmarsat did not, through the Equity Transaction, achieve a "substantial dilution" of Signatory ownership interests in a manner consistent with FCC precedent and the underlying intent of the ORBIT Act. In the *New Skies Market Access Order*, the Commission suggested that "substantial dilution" results, not merely from a substantial percentage reduction in Signatory ownership, but also from an increase in the "diversity" of the entity's ownership.[56] Indeed, one of the main purposes of conducting a public offering is to increase the breadth of corporate ownership, both relative to pre-existing shareholders, and also in an absolute sense.

While Inmarsat has transferred roughly 57% of its ownership to non-Signatory shareholders, it has done so by substantially narrowing, rather than widening, its shareholder base. Whereas previously, ownership was distributed among eighty-five

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[56] *See In the Matter of New Skies Satellites, N.V. Request for Unconditional Authority to Access the U.S. Market*, 16 FCC Rcd. 7482, 7488 (2001) (the "*New Skies Market Access Order*") ("In particular, we believe that a sufficient level of New Skies stock is now owned by individuals and companies other than INTELSAT Signatories, to give it a strong incentive to act in the interest of all rather than any particular shareholder").

Signatories, with no one or two Signatories having control, today two shareholders -- Apax Partners and Permira – exercise control over Inmarsat. The structure of Inmarsat is now such that holders of Class B shares other than Apax Partners and Permira are restricted from transferring their interests without the effective consent of Apax Partners and Permira. Furthermore, Apax Partners and Permira are themselves restricted from selling shares without the consent of the other. This structure allows Apax Partners and Permira to stifle attempts to diversify ownership, and indeed permits them to prevent the further disposition of Signatory shares to non-Signatory parties, in contravention of the purpose and intent of Section 621.

*2. The Transactions did not Transform Inmarsat into a Publicly Held Company.*

The Inmarsat Transactions are also inconsistent with the ORBIT Act because they do not result in the transformation of Inmarsat into a publicly held company. As noted by the Commission, public ownership was Congress' objective when it drafted Sections 621(5)(A) and (B) of the ORBIT Act.[57] In its post-Transactions form, Inmarsat fails to satisfy this objective because its shares are still not, as are those of public companies, "traded to and among the general public."[58] The ownership of Inmarsat remains closely held in the hands of a few private investors; its shares are not listed on any stock exchange, and there is no public market for its equity capital.

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[57] *See, e.g., Inmarsat Market Access Order*, 16 FCC Rcd at 21689 n. 118 (the Commission declared that subsections (A) and (B) of Section 621(5) "address requirements for the corporation to become a publicly held company").

[58] Black's Law Dictionary, *supra*, at 344.

Moreover, because there are now substantial restrictions imposed on the transfer of Class B Inmarsat stock, there is effectively no private market either.

Inmarsat's creation of a public market for its debt securities is not a substitute for the creation of a public market for its equity securities. Regardless of the nature of the exchange on which debt is traded, or the size of the market that exists to sell it, the sale of notes and other debt instruments does not, by definition, confer upon its holders ownership or control of the issuing company. A note instrument amounts to no more than a "written promise by one party . . . to pay money to another party."[59] A note does not provide its holder with the right to vote on such key corporate governance matters as the election of the company's board of directors and the selection of the company's independent accountants, as do equity securities. As such, a public offering of notes cannot itself transform a company like Inmarsat into a publicly held corporation.

Moreover, even if debt securities could somehow be equated with equity, for U.S.-based purchasers, obtaining debt securities on the PORTAL market is less accessible than purchasing publicly traded equity. The latter is usually listed on a major stock exchange and is fairly easy to buy through online trading services and other means. Purchasing debt securities on PORTAL, in contrast, generally requires additional know-how, and the use of a knowledgeable, potentially costly broker or other intermediary.[60] PORTAL-listed debt is not typically purchased by individual investors, nor can it

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[59] *Id.* at 1085.

[60] The secondary market for PORTAL securities is broker/dealer-based. *See generally* National Association of Securities Dealers, Inc., *PORTAL Expected to Benefit Private Placement Market* (1990), *available at* http://business.cch.com/primesrc/bin/highwire.dll.

typically be purchased through ordinary retail brokerage arrangements or via the Internet.[61] The result is that, although Inmarsat's debt securities may be "publicly" traded, they will likely continue to be held by a relatively narrow group of experienced investors, and remain inaccessible to the broader public. By contrast, under the IPO scheme specified by Congress, the broader public would have benefitted from ownership of Inmarsat.

Inmarsat tries to avoid this reality by characterizing the public listing requirement of the ORBIT Act as being exclusively intended to provide for public oversight of Inmarsat and the public disclosure of its financial and other information. Although these are certainly some of the stated objectives of Section 621(5)(B), they are not, as noted above, the exclusive objectives of this requirement.

*3. The Oversight and Transparency Mechanisms to which Inmarsat's U.S. Registered Notes are Now Subject are not Comparable to those Associated with a Public Listing of Equity Securities.*

The Transactions furthermore do not provide the same degree of oversight and transparency that would result from a public equity offering. As such, the Transactions do not comport with the IPO requirements of the ORBIT Act.

In its Letter to the Commission, Inmarsat boasts various oversight and transparency requirements associated with the Debt Transaction. For example, it notes that because its debt securities are listed for trading on the Luxembourg Stock Exchange, Inmarsat is subject to ongoing disclosure requirements that include the filing of annual

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[61] Securities listed on the PORTAL Market are limited to private placements exempt from registration under SEC Rule 144A; as such, PORTAL securities are not available to the general public and are instead traded among qualified institutional buyers, including institutional investors with assets in excess of $100 million and certain broker-dealers. *See id.*

and semi-annual reports.[62] With respect to its offerings in the United States, which include a private offering pursuant to SEC Rule 144A, an "A/B" exchange offer to be registered with the SEC under the Securities Act of 1933, and the trading of its securities on the PORTAL market,[63] Inmarsat also notes that it will be required to file periodic and current reports under the Securities Exchange Act of 1934.[64]

The requirements associated with these various listing and trading arrangements, while perhaps better than nothing, are not remotely comparable to requirements associated with an equity IPO on a national stock market in the United States.[65] Had Inmarsat conducted an IPO of equity securities in the United States, even in conjunction with a foreign offering, it would have become subject to the listing requirements of a national stock exchange such as the New York Stock Exchange ("NYSE") or the NASDAQ.

Among these listing requirements are significant corporate governance requirements and standards. The NYSE, for example, requires listed companies to maintain: (1) a fully independent audit committee with a written audit committee charter;

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[62] *See Inmarsat Letter* at 10-12.

[63] *See id.* at 4-5.

[64] *See id.* 12-15.

[65] The requirements of the United States markets are relevant in this instance because, although the ORBIT Act does not expressly require Inmarsat to list its shares on a major United States stock exchange, Inmarsat would, as a practical matter, be expected to do so in an equity IPO in order to maximize liquidity. In fact, when Inmarsat previously contemplated an equity IPO, it informed the Commission that it would likely list its shares on either the NASDAQ or the New York Stock Exchange. *See Inmarsat Market Access Order*, 16 FCC at 21688. New Skies, meanwhile, also listed its stock on both the NYSE and the Euronext Amsterdam N.V. stock markets. *See New Skies Market Access Order*, 16 FCC Rcd at 7490.

(2) a fully independent nominating/corporate governance committee with a written charter; (3) a fully independent compensation committee with a written charter; (4) the independence of a majority of the company's board of directors; (5) non-executive board meetings; and (6) a certification of the chief executive officer of the company that there has been no violation of the corporate governance rules.[66] NASDAQ maintains similar requirements for listed companies.[67] Inmarsat would not become subject to these requirements either through its contemplated offerings of debt securities in the United States, or through its corresponding obligations arising from the Securities Exchange Act of 1934.

Accordingly, had Inmarsat conducted an IPO of equity as the ORBIT Act contemplates, it would likely have become subject to corporate governance requirements to which it is not currently subject. Inmarsat's subjection to these requirements would have significantly furthered the stated goal of the ORBIT Act to transform Inmarsat into an "independent commercial entity" with a "pro-competitive ownership structure."[68] But Inmarsat chose not to subject itself to these requirements, and thereby failed to act consistently with the ORBIT Act.

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[66] *See* NYSE Listing Rules 303.01(A), 303A.

[67] *See* NASDAQ Listing Rule 4350.

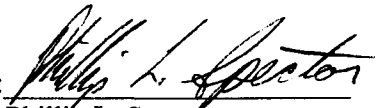
[68] ORBIT Act, § 621(2).

## III. CONCLUSION

For the foregoing reasons, SES AMERICOM requests that the Commission reject Inmarsat's statement of compliance with the IPO requirements of the ORBIT Act, and instruct Inmarsat to comply with these requirements.

Respectfully submitted,

SES AMERICOM, INC.

By: 

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April 5, 2004

## CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April 2004, I caused a copy of the foregoing Comments of SES AMERICOM, Inc., to be served by hand, on the following:

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